BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	)))))))))	PSC DOCKET NO. 14-193

JEREMY FIRESTONE'S PRE-HEARING BRIEF IN OPPOSITION TO THE PROPOSED SETTLEMENT AND TO THE PROPOSED MERGER

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Introduction and Summary of Argument

1. This case concerns the transfer of control of Delmarva Power from Pepco Holdings, Inc. (PHI), an entity focused on distribution customers, to Exelon, an entity, hopelessly conflicted between its generation assets and the best interests of its shareholders to whom it owes a fiduciary duty on the one hand, and distribution customers, on the other. Under the governing statute, for a transfer of control to be authorized it has to be "consistent with the public interest" and for a "proper purpose." 26 Del C. § 215(d).[1]

2. The Commission has before it a proposed settlement between the PSC Staff, the Public Advocate (DPA), the Delaware Department of Natural Resources and Environmental Control (DNREC), the Mid-Atlantic Renewable Energy Coalition (MAREC), and the Clean Air Council (CAC), on the one hand, and the Joint Applicants, Exelon and Pepco Holdings, Inc. (PHI), and their subsidiaries, including Delmarva Power of Delaware (hereinafter, jointly referred to as the "Joint Applicants" or "Exelon"), on the other. Although proposed settlements are to encouraged, they are to be so only "[i]nsofar as practicable." 26 Del C. § 512 (a). Moreover, the Commission is not a rubberstamp working on behalf of the settling parties; rather, the Commission may approve a proposed settlement only after having conducted a searching evidentiary hearing and only if it is able to find that the terms of such proposed resolution are "in the public interest." 26 Del C. § 512 (c).

3. The Joint Applicants cannot meet their burden required by Section 215, and the settling parties cannot meet the burden required by Section 512. As I set out below, the non-Joint

[1] The change in control also must satisfy 26 Del. C. § 1016, which I do not contest.
[2] Ex. S-1, Confidential Direct Testimony of Connie S. McDowell, 8:9-14.
[3] Id. at 8:16-21.

Applicant settling parties have had to walk away from and effectively disavow much of their prior testimony in order to support a proposed settlement that does not find support in the record before the Commission, that seeks Commission endorsement of their particular interests and agendas, that is not based on sound economic analysis, and that does not protect the public from rationally-based economic incentives that Exelon faces. More particularly,

a. The proposed Customer Investment Fund (CIF) does not have a scientific basis and is inadequate (Argument, Section B.1.);
b. The settling parties seek to restrict Commission choice on how to use the CIF and select a use and a method that are Not Consistent with the Public Interest (Argument, Section B.2.);
c. The proposed settlement neglects costs of the merger in terms of renewable energy, energy efficiency and the like (Argument, Section B.3);
d. The proposed settlement falls far short of the PSC Staff's understanding of what is Required in the Public Interest and is inconsistent with the testimony of DNREC's and MAREC's lead witnesses, Tom Noyes and Peter Bradford, respectfully (Argument, Section B.4);
e. In light of Exelon's actions in this docket, it cannot meet its burden of demonstrating that a change in control is in the Public Interest (Argument, Section C.); and
f. Exelon cannot meet its burden of establishing that the change in control is for a Proper Purpose (Argument, Section D.).

4. Even if Exelon and the settling parties could meet the burdens established under Delaware law, the Commission would be required to either deny the application without prejudice or order further discovery in light of the violations of rights, fundamental notions of fairness, and bias. (Argument, Section E).

Argument

A. Public Interest: Governing Law

5. **Standard of Review**: The Commission's findings are required to be supported by sufficient evidence, free of error of law, including satisfying due process of law, and not arbitrary or capricious. Constellation V. Public Service Commission, 825 A. 2d 872 (Del: Superior Court 2003).

6. **Public v. Private Interest and Costs of Achieve Merger and Costs to Achieve Savings:** The US Supreme Court has noted that there is a difference between the "public interest" and private, commercial interests, finding it "clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility." FPC v. Sierra Pacific Power Co., 350 US 348 (US 1956). In a similar vein, whether the merger is profitable or unprofitable to Exelon is of no moment to the Commission. Thus, in an earlier merger, this Commission approved a merger settlement that explicitly barred Delmarva Power from seeking the recovery of merger transaction costs. Constellation v. Public Service Commission, 825 A. 2d 872 (Del: Superior Court 2003).

7. The action taken and the rationale supplied by the Louisiana Public Service Commission (LPSC) in the SWEPCO/CSW/AEP merger is instructive. Louisiana Public Service Commission Order No. U-23327, Southwestern Electric Power Company "SWEPCO", Central And South West Corporation "CSW" and American Electric Power Company, Inc. "AEP," available at www.utilityregulation.com/content/orders/99LAOrderU-23327.pdf. There, the applicants proposed that the ratepayers bear all of the costs to bring about the merger. Thus, when calculating the savings they proposed to share with the ratepayers, the merging companies netted out both the "costs of the merger" and the "costs to achieve the savings." Id. at 10. However, given that the companies had agreed to merge, "first and foremost," because they believed that the merger was in the best interest of their shareholders," the LPSC first concluded that "the owners of the Company, not their customers, should bear the cost to achieve the merger." Id. at 10. Regarding the issue of the costs to achieve the savings, the LPSC staff argued that such costs to achieve the savings should "be treated in the same manner as the costs to achieve the merger, that is, they should be borne by shareholders, and any recovery will be out of the Company's retained savings." Id. at 11. The LPSC found the position advocated by staff to be appropriate since it was "consistent" with the treatment of the costs of the merger. Id. The LPSC also found such "treatment is fair." Id. It is appropriate here in Delaware for Commission to follow the sensible interpretation and rationale adopted by the LPSC.

8. **The "Public Interest" is Broad and Includes Values, Practices and Policies Associated with Renewable Energy Resources, Electric Vehicles, and Energy Efficiency**: As noted by the Delaware Supreme Court in Public Water Supply Co. v. DiPasquale, 735 A. 2d 378 (Del. Supreme Court 1999), the public interest is determined by reference to the interests the

Commission is "designed to protect." The interests that the Commission is designed to protect are much broader than "lowest reasonable costs" and reliable service and include:

- Resources that provide short- or long-term **environmental benefits** to the citizens of this State (such as renewable resources like wind and solar power) Title 26 Del. Code §1007(c)(1)b.2.
- Resources that promote **fuel diversity**. Title 26 Del. Code §1007(c)(1)b.5.
- Resources that promote **price stability**. Title 26 Del. Code §1007(c)(1)b.7.
- **Green power** options. Title 26 Del. Code §1012(b).
- Grid-integrated **electric vehicles**. Title 26 Del. Code §1014(g-h).
- **Energy Efficiency**, including demand-side management and loading orders that **prioritize renewable energy** and weatherization assistance. Title 26 Del. Code §1020.
- **Renewable Energy Portfolio Standards**. Title 26 Del. Code §§ 351-364.
- **Environmental Benefits and External Costs, including Health Externalities**. IRP Rules, Title 26, 3010, Public Utility Energy Regulation

9. The broad notion of "public interest" was seconded by Delaware courts in Constellation v. Public Service Commission, supra. In that case, the court was reviewing a merger settlement that in pertinent part provided that Delmarva Power would contribute money toward the promotion of renewable energy and participate in a working group whose charge was to identify and develop demand side management and conservation programs. The Constellation Court considered the question of these and other benefits and their contribution to the public interest to be so beyond reproach that it stated that it "need not belabor them here."

10. Delaware courts relying on DPA also have found that the public interest is advanced from rate certainty—an attribute of renewable resources, which have no fuel costs—even if those rates may not be the "very lowest rate possible."

> I think rate certainty is a benefit regardless of the rate level**.** I mean, a customer may be willing today to lock in a certainty rate for a long-term period even if there's a possibility that rates will fall in the future. It's essentially like an insurance policy; you know what you'll be paying. And I think there is a benefit to that even if I may not get the very, very lowest rate possible during this four or five year period, at least I know what my costs are going to be, and I think there's a benefit to that.

Andrea Crane on behalf of the DPA, quoted and relied on by, Constellation V. Public Service Commission, 825 A. 2d 872 (Del: Superior Court 2003) (emphasis added).

11. In the present docket, the PSC Staff explained its understanding of "public interest" as requiring the advancement of the general welfare or well-being:

> According to the Random House Dictionary, "public interest" is defined as the welfare or well-being of the general public and according to BusinessDictionary.com, public interest is the welfare of the general public (in contrast to the selfish interest of a person, group, or firm) in which the whole society has a stake and which warrants recognition, promotion and protection by the government and its agencies.[2]

12. The PSC Staff then clarified that the relevant "public" is not limited to ratepayers, but rather, includes all Delaware residents.

> In considering whether this merger is in the public interest, the general public could entail the ratepayers, DP&L (the utility itself and its current and former employees), the Commission, stakeholders, other government regulators, Delaware labor unions, Governor and State Administration, Legislators, protectors of the environment, businesses, the general population of the State of Delaware, etc.[3]

[2] Ex. S-1, Confidential Direct Testimony of Connie S. McDowell, 8:9-14.
[3] Id. at 8:16-21.

13. Finally, the PSC Staff stated that the "public interest" is approximated by comparing the expected gains and potential costs or losses associated with a decision, policy, program, or project."[4] In that light, when comparing two policy options, the one with the greatest expected net gains (gains minus losses) can be said to further the public interest more.

14. **A Change in Control that Results in Re-Integration is Relevant to the Consideration of the Public Interest.** Title 26 Del. Code §1013 addresses under what circumstances the Commission may seek market power remediation for adverse affects to retail electric customers that arise from the same entity that supplies electric power owning generation assets. In the case before the Commission, the Joint Applicants propose changing control from an entity that has divested itself of generation assets, PHI, to one, Exelon, that is one of the country's largest generators. Under Section 1013(b), however, the Commission may only order divestiture of generation assets of an integrated company "in an extreme condition and as a last resort." Given the high standard and heavy burden placed on the Commission, a change in control that would result in re-integration and/or that affects the potential and degree to which market power might be exercised is relevant to the Commission's determination of public interest.

B. The Joint Applicants' Have Failed to Meet Their Burden of Demonstrating that Substantively the Change in Control is Consistent with the Public Interest and the Settling Parties Have Failed to Meet Their Burden of Demonstrating the Proposed Settlement is in the Public Interest.

15. In support of their application for a change in control, the Joint Applicants advanced two primary commitments: (a) a reliability commitment that the Joint Applicants valued at $74.3

[4] Id. at 8:14-16.

million; and (b) a $17 million customer investment fund (CIF), which the Commission would be free to dedicate for any purpose it desires, including, for example, renewable energy.[5]

16. In the proposed settlement, reliability metrics have been changed and the CIF has been increased to $40 million, as will be discussed below. It is however useful to understand the lack of scientific basis of both, particularly the CIF given its inclusion in the proposed settlement. Turning however first to reliability, Dr. Jeremy Firestone submitted rebuttal testimony that corrected errors in the analysis of the alleged reliability benefits, which resulted in the actual "net benefits" costing ratepayers $17.6 million.[6] Although Dr. Tierney filed rebuttal testimony more generally, Dr. Firestone's testimony on that point remains uncontroverted.[7]

B.1. The CIF Lacks a Scientific Basis and is Inadequate

17. The CIF is based on a synergy analysis performed by Exelon's consultant, Boston Consulting Group (BCG).[8] Exelon produced Mr. David Gee, a Partner and Managing Director of BCG for his deposition. After that deposition, Dr. Firestone testified regarding a number of fundamental errors in Mr. Gee's analysis.[9] Other experts, such as the Public Advocates' (DPA)

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[5] Ex. JA-7, Direct Testimony of Dr. Susan Tierney.
[6] Ex. JF-3, Direct Testimony of Jeremy Firestone, 25:2 – 26:21 and Table 2, p. 27. Dr. Firestone testified in particular about the failure to include the incremental costs to achieve those enhanced reliability benefits and basing Delmarva Power's future reliability performance in the absence of merger on outdated performance metrics rather than on current projections,
[7] Dr. Tierney in her Rebuttal Testimony purported to rely on Mr. Alden and Mr. Gausman to rebut this portion of Dr. Firestone's Direct Testimony. However, neither Mr. Alden nor Mr. Gausman addressed the metrics relied on Dr. Firestone let alone mention Dr. Firestone's name. Dr. Tierney's testimony in this regard to that one issue was subject to a February 2, 2015 Motion in Limine, which is incorporated by reference. Senior Hearing Examiner Lawrence denied that Motion without prejudice in Order 8707 (February 5, 2015).
[8] Ex. JA-6, Carim Khouzami Direct Testimony, pp. 23-26.
[9] Ex. JF-3, Firestone Direct, 8:19 – 10:15.

witness Glen Williams, also provided critiques of Mr. Gee and BCG, concluding that "little or no credence can be given to these various models as being predictive of future events"[10]

18. Although I made a request to the Joint Applicants to produce the underlying data from which the models were generated as a follow-up to the deposition, and to answer certain other questions regarding what they did produce, so that Mr. Gee's models could be verified and analyzed and additional models run, Exelon failed to produce that data.[11] The failure to produce the data hampered other analysts, including the DPA's Glen Watkins, who, as a result, found it "impossible to replicate" BCG's analysis.[12]

19. Mr. Gee also made a number of questionable assumptions. For example, he arbitrarily cut-off the synergy savings at the fifth year, doing so at the direction of Exelon.[13] The PSC Staff likewise raised questions with BCG's synergy analysis, with Staff witness Welchlin using 10 years as the basis for the synergy analysis.[14]

20. The DPA also concluded that a 10-year synergy analysis was appropriate,[15] and "reasonable,"[16] although Mr. Watkins also opined that at the end of the day "[l]ittle to no credibility can be given to BCG's estimated annual steady-state synergy savings."[17]

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[10] Ex. DPA-2, Direct Testimony of Glen Watkins, 24:1-2. See also Ex. JF-27, DPA's Objections and Responses to the Joint Applicants' Second Set of Data Requests (Watkins Responses), JA-DPA-22 and JA-DPA-23.
[11] Ex. JF-3, Firestone Direct, at 10:2-6
[12] Ex. DPA-2, Watkins Direct Testimony, 25: 3-4
[13] Ex. JF-3, Firestone Direct Testimony at 10:18 – 11:15.
[14] Ex. S-2, Supplemental Direct Testimony of Connie S. McDowell, 2:18-19.
[15] Ex. DPA-2, Watkins Direct Testimony, 34:17-22.

21. Mr. Gee also inappropriately allocated costs to achieve to PHI. See Constellation v. DE PSC, supra; FPC v. Sierra Pacific Power Co., supra; LA PSC, supra. As Dr. Firestone testified:

> The BCG analysis offsets the synergy savings with … costs to achieve. The … figure that BCG landed on was reduced from an earlier figure…, as BCG determined that executive compensation should instead be a cost allocated to Exelon. That is an appropriate first step, but the remainder of the costs to achieve should not have been allocated to the ratepayers either. All are merger-related costs, and in that regard are no different than the $1 billion+ premium Exelon agreed to pay Pepco Holding Inc. (PHI) shareholders. All of those costs should be treated the same, none should be allocated to the ratepayers and all should be the responsibility of Exelon and its shareholders.[18]

22. Likewise, the proposed settlement inappropriately contemplates and allows Exelon to recoup costs to achieve from the ratepayers.[19] See Constellation v. DE PSC, supra; FPC v. Sierra Pacific Power Co., supra; LA PSC, supra. Yet, all such costs are "simply a cost of closing the transaction."[20]

23. In addition, BCG allocated more of the net synergy savings to Exelon and its shareholders than it did to PHI, without providing adequate justification for why all of the synergy savings (other than those that would benefit ratepayers in other jurisdictions) should not

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[16] While acknowledging that there is "no precise, correct or incorrect time period, a "10-year period is reasonable in that synergy savings are not estimated into perpetuity or over an unreasonably long time period" while a "shorter time period understates the true synergy savings." Ex. JF-27, DPA's Objections and Responses to the Joint Applicants' Second Set of Data Requests (Watkins Responses), JA-DPA-33.
[17] Ex. DPA-2, Watkins Direct Testimony, 26:11-12.
[18] Ex. JF-3, Firestone Direct Testimony at 11:22 – 12:6.
[19] Ex. JA-47, Proposed Settlement, (¶¶ 86-89).
[20] Ex. JF-18, Staff Confidential Responses to Join Applicants First Set of Data Requests, Requests, JA-PSC-49.

go to PHI.[21] As the DPA's Glen Watkins stated, the "analysis appears to have been performed from the perspective of Exelon's shareholders"[22]

24. Despite spending vast sums on BCG, Exelon chose not to defend the un-defensible, threw up its hands and effectively threw Mr. Gee under the bus (he was not identified as a witness in the now-cancelled February evidentiary hearing), and came up with a new calculation method on rebuttal that magically arrived at the precise same total of net synergies.[23]

25. A revised synergy analysis that takes into account items such as a longer time horizon (10 years), re-allocation of synergy benefits from Exelon's shareholders to PHI ratepayers, and does not burden PHI ratepayers with Exelon's costs to achieve, when discounted at 10%, results in synergy savings of $104 million, almost an order of magnitude greater than that which formed the basis of Exelon's CIF.[24] When Staff re-analyzed the CIF, it arrived at $83 million synergy savings.[25]

26. DPA, considering only a longer time horizon of 10 years, arrived at a synergy savings of $60 million, "which given the risks that will be borne by Delmarva Delaware's ratepayers and

[21] Id. at 12:8-21.
[22] Ex. DPA-2, Watkins Direct Testimony, 22:5-6.
[23] Ex. JA-14, Rebuttal Testimony of Carmin Khouzami 3: 22- 4:l-17. This magical thinking was subject to a Motion in Limine because it abandoned Mr. Khouzami's direct testimony, did not challenge the method/analysis of Dr. Firestone and others, and instead attempted to establish a case-in-chief. That Motion was denied by Hearing Examiner Lawrence without prejudice (Order 8707) on February 5, 2015, and the Motion, including attachments is incorporated herein by reference.
[24] Ex. JF-3, Firestone Direct, 13:1 – 14:9, including Table 1. See also Ex. JF-15, Supplemental Testimony of Jeremy Firestone, 6:13-16.
[25] See Ex. S-2, Supplement McDowell Testimony, 2:18-19.

the State at large, the windfall that will accrue to PHI shareholders and senior executive management and the certain benefits that will accrue to Exelon's unregulated businesses and non-PHI regulated businesses, … is fair and equitable to all stakeholders."[26] Moreover, as DPA acknowledges, there is a significant financial downside to Delaware from Exelon's assumption of ownership of Delmarva Power. It will result in "upward pressure on" Delmarva Power's "regulated rates due to additional layers of overhead" and a "reduction to discretionary income" which "will be detrimental to the State of Delaware's economy."[27]

27. When synergies are thus properly considered, the $40 million that the non-Exelon settling parties agreed to falls far short of the amounts that Staff, DPA and I determined to be fair, appropriate, and equitable to Delmarva Power's ratepayers. As such, the proposed settlement is not in the public interest.

B.2. The Settling Parties Seek to Restrict Commission Choice on How to Use the CIF and Select a Use and a Method that are Not Consistent with the Public Interest.

28. While the Joint Application rightfully placed the decision on how to use the lion-share of the financial part of the settlement in the hands of the Commission, in the proposed settlement, the settling parties attempt to restrict Commission choice and decide for themselves the what (ratepayer rebate rather than, for example, expenditure on energy efficiency), to who (all ratepayers rather than low income ratepayers), and when (over ten years rather than an upfront

[26] Ex. DPA-2, Watkins Direct Testimony at 35:8-12. See all more generally id at 34:8–35:7 and Schedule GAW-2 attached to his testimony, where he actually found that the appropriate number was $62.4 million and then he rounded down to $60.0 million.
[27] Ex. JF-27, DPA's Objections and Responses to the Joint Applicants' Second Set of Data Requests (Watkins Responses), JA-DPA-20 and JA-DPA-27. See also Ex. JF-18, Staff Confidential Responses to Join Applicants First Set of Data Requests, Requests, JA-PSC-50.

one-time lump sum payment) based on their own preferences and concerns. As the DPA's witness noted, were the proposed settlement to be structured otherwise, the DPA and the other settling parties would "be soon forgotten."[28] The important point, however, is not whether or not they or I or the Commission is remembered, but the best interest of the ratepayers and Delawareans.

29. While a proposed settlement that dedicates only a minor fraction of the funds to particular uses is not per se unreasonable, a proposed settlement becomes so when the vast majority (more than 90 percent in this instance) of funds are dedicated to a single purpose in a very specified manner. When it comes to uses of settlement monies, the Commission should be looked to be more than a rubber-stamp of the settling parties' various agendas, for it is the Commissioners that the General Assembly has given, and the Commissioners by agreeing to serve in that role have assumed, the solemn authority and obligation to advance the public interest. As such, Commissioners are not bound as a general proposition nor should they be asked to bind themselves in that manner.

30. Turning from general principles to the application in the present docket, the failure of the settling parties to advance the best interest of the ratepayers becomes clear when we exam the record established in this docket, including the analysis undertaken by Exelon's expert witness, Dr. Susan F. Tierney, who analyzed the relative merits of three alternative distribution/use schemes for the CIF—a lump sum payment to all ratepayers, a lump sum payment to low-income ratepayers, and energy efficiency.

[28] Ex. DPA-2, Watkins Direct Testimony on behalf of the Delaware Public Advocate, 36:5.

31. First, the record is clear—the economic benefits from investing the money in energy efficiency are three times as great as those associated with a rebate to all ratepayers.[29] In light of the way the money was allocated, even a settling party witness, Thomas Noyes acknowledged the proposed settlement's short-comings, stating on cross-examination, that there is "the potential for cost effective energy efficiency in Delaware" in an amount "much greater than anything included in this settlement."[30]

32. Second, the economic benefits associated with a rebate that is limited to lower-income ratepayers are greater than those associated with a general rebate.[31] "This occurs because lower income ratepayers are much more likely to spend their rebate than are high-income ratepayers, and such spending has indirect economic benefits."[32]

33. Third, the agreed interest rate is both insufficient to make the ratepayers whole and serves to enrich Exelon to the tune of $14 million. That occurs because the real private discount rate is likely at least 20 percent and perhaps significantly higher (while the settlement is premised on an interest rate of a mere 4.5 percent), and because Exelon expects to earn 10 percent while only

[29] Ex. JA-7, Direct Testimony of Dr. Susan F. Tierney, Table SFT-5, p. 35; Ex. JF-15, Firestone Supplemental, 7:3-13. While some may claim that there is a Delaware process to allocate ratepayer money toward efficiency and as a result the proposed settlement should not allocate settlement dollars to energy efficiency, there are two responses. First, the proposed settlement is not allocating ratepayer money but rather settlement dollars. Those dollars do not become ratepayer money unless and until the Commission so orders. Second, the proposed settlement does allocate "up to" $2 million to energy efficiency so the parties themselves recognize that the process is no bar.
[30] Ex. JF-14, Cross-examination Deposition Transcript of Thomas Noyes, 47:22 - 48:1.
[31] Ex. JA-7, Direct Testimony of Dr. Susan F. Tierney, Table SFT-5, p. 35.
[32] Ex. JF-15, Firestone Supplemental Testimony at 7:9-11.

paying out at a rate of 4.5 percent.[33] Under the settling parties' vision, a gas-only customer would receive about 50 cents/month rather than an upfront payment of $50. While the settling parties might soon be forgotten if those ratepayers were to receive $50, those ratepayers would at least have $50 to, for example, pay down credit card debt at much higher interest rates.

34. Dr. Firestone in his Supplemental Testimony[34] describes in great detail, with reference to both economic studies and real world examples, why the 4.5% interest rate is grossly lacking, why the settling parties failed in their "attempt[] to develop a method that would provide long-term benefits to ratepayers"[35]—indeed, why their attempt provides the precise opposite, a long-term detriment to ratepayers—and rather than being merely "fair to Exelon,"[36] the CIF scheme enriches Exelon.

35. What we are left with is the settling parties deciding the manner in which rebates are to be structured—a manner that failed to consider how ratepayers are likely to want the rebates structured. Moreover, the what, who and the when chosen by the settling parties all run counter to the public interest (as noted earlier, the dollar figure was negotiated on the basis of a synergy savings analysis that was itself based on failed mathematics/statistics, which only serves to compound the errors) in that they have chosen the least beneficial use for the CIF—general rebate—despite the fact that when comparing two actions, the "public interest" is furthered more

[33] Id. at 7:21 – 11:9.
[34] Id.
[35] Ex.JF-17, DPA Response to JA-DPA-37.
[36] Id.

when the net gains of one action exceed the net gains of the other.[37] The settling parties then compound their error by providing ratepayers with a piddling amount each month while enriching Exelon, effectively transferring ratepayer wealth to Exelon. Rather than rubber-stamping the settling parties' series of unfortunate choices, the Commission needs to exercise its independent judgment and decide on its own best judgment how to allocate the CIF, preferably after notice and an opportunity of the public to be heard on this important public issue.

B.3. The Settlement neglects costs of the merger in terms of renewable energy, energy efficiency and the like.

36. Dr. Tierney testified that Governor Markell's 2013 and 2104 State of the State Addresses shaped her analysis.[38] She quoted the Governor declaring that we "need to expand our energy portfolio, reduce costs and improve air quality" and that the "ability to …. access cleaner, cheaper, and more reliable energy, is essential to every industry in our state."[39] Exelon's actions, however, paint a completely different and troubling self-portrait.[40]

37. Perhaps that is why, despite, in pre-filed supplemental testimony having opined that the proposed settlement was consistent with the public interest, DNREC's Thomas Noyes can best be described during his cross-examination as a mix of uncomfortable acceptance of a proposed settlement that gives short shrift to renewable energy and energy efficiency and to the

[37] As noted earlier, according to the PSC Staff, the "public interest is "approximated by comparing the expected gains and potential costs or losses associated with a decision, policy, program, or project." Ex. S-1, Direct Testimony of Connie McDowell at 8:14-16.
[38] Ex. JA-7, Tierney Direct, 9:7-19
[39] Id. at 9:14-19.
[40] See generally, Ex. JF-15, Firestone Supplemental Testimony at 11:11 – 16:21.

divergent interests of DNREC and Exelon[41] and consciously uninformed of pertinent facts regarding Exelon's actions, the consistency of the proposed settlement with Delaware policy goals and the satisfaction of the Independent Market Monitor (IMM) regarding market power, which was a focus on Mr. Noyes' earlier direct testimony.[42] These facts include:

38. To Exelon, **existing RPS laws** are not good policy to advance climate, energy and health goals, but rather "**market and financial risks**" to its shareholders**.**[43]

39. **Exelon actively opposes RPS expansion.** Exelon opposed Maryland's recent attempt to expand its RPS to 40 percent[44] in whole or in part because Exelon's internal "analysis of the impact to the revenues" of Exelon Generation "was negative."[45] Exelon also opposed changes to Illinois RPS law.[46] Exelon's opposition is a significant change adverse to the public interest

[41] A review of the transcript highlights the numerous objections put forward by counsel for DNREC, DPA and the Joint Applicants given the Mr. Noyes was testifying via deposition rather than live before the Commission in an attempt to limit the damage. In contrast, Counsel for PSC Staff was notably quiet. See generally Ex. JF-14, Cross-examination Deposition Transcript of Thomas Noyes.
[42] See Ex. DNREC-4, Supplemental Testimony of Thomas Noyes. See also Ex. JF-14, Cross-examination Deposition Transcript of Thomas Noyes; id. at 8:17-22 (unaware of whether the proposed settlement addresses IMM concerns); 16:7-14 (unaware that Exelon filed for Rehearing and filed a lawsuit seeking to overturn the Illinois Commerce Commission decision on the Rock Island Clean Energy Line); 25:13-17 (unaware of Exelon's successful efforts to beat back an attempt to expand the Maryland RPS); 43:7-14 (unaware of whether or not additional natural gas generation would be consistent with Delaware's climate policy goals).
[43] Ex. JF-5, Exelon 2014 10k, pages 41-64.
[44] Ex. JF-9, Anne M. Linder, Exelon, Letter regarding Maryland SB 733 – Public Utilities—Renewable Energy Portfolio Standards, undated.
[45] Ex. JF-2, Deposition of Scott Brown, p. 118; see id, more generally, pp. 117-120.
[46] Id. at 120.

given that PHI, which has a presence in Maryland through PEPCO and Delmarva Power, did not oppose the enhanced Maryland RPS law.[47]

40. During cross-examination, DNREC's Tom Noyes demonstrated a lack of awareness of Exelon's successful efforts to thwart neighboring Maryland's attempt to expand its RPS law,[48] with Mr. Noyes "guess[ing] that he "wasn't following that proposal."[49] This lack of attention suggests that the issue of the increased likelihood that Delaware will be exposed to opposition to renewable policies like RPS expansion was not adequately considered by DNREC in its decision to support the proposed settlement and find it consistent with the public interest.

41. **Exelon opposed and continues to oppose the Rock Island Clean Energy Transmission Line,** that if built will transmit up to 3500 MW of wind power from the Midwest into PJM.[50] Even after the Illinois Commerce Commission (ICC) issued a certificate of public convenience and necessity over Exelon's objections, Exelon requested rehearing, and is presently seeking to overturn the ICC decision in court.[51] If wind power capacity that would otherwise be installed if the Rock Island Clean Energy Line is built fails to materialize in part because of Exelon's policies, practices, and advocacy, Delawareans will have higher monthly electric bills than they would otherwise:

a. They will have to pay more for renewable energy credits (RECs); this is a simple case of demand, which is mostly fixed in the short-term based on various state RPS laws,

[47] See Joint Applicants Responses to Firestones 4th Data Set Request, Request for Admissions.
[48] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 25:13-17.
[49] Id. at 26:1-3.
[50] Ex. JF-3, Firestone Direct, 20:15-18.
[51] See http://www.icc.illinois.gov/docket/Documents.aspx?no=12-0560

and supply, which is variable.[52] DNREC's Tom Noyes quantified the impact on ratepayers: this way: For "[e]very dollar increase in REC prices would represent an additional $1.9 million in cumulative ratepayer costs between now and 2024/25. Likewise, every dollar increase in SREC prices would represent an additional $842,943 in cumulative ratepayer costs between now and 2024/25."[53] As a result, on "this subject, Exelon's interests and Delaware's are opposed."[54]

b. "As well, if less wind power is built, the market clearing price in a given hour will increase, as wind power would otherwise be under a contract, or if it is not, bid in at $0, raising the price that Delmarva Power ratepayers must pay for energy regardless of its source, including coal, natural gas, and Exelon's nuclear power."[55]

After the proposed settlement was consummated, Tom Noyes re-affirmed DNREC's support for transmission projects such as the Rock Island Clean Energy Line as a way to bring 3500MW of wind energy into PJM because if built it/they would support Delaware's RPS with both an adequate supply of RECs and RECs at lower prices.[56] While Mr. Noyes was aware of Exelon's earlier opposition to the Rock Island Clean Energy Line, he was totally unaware that Exelon had ratcheted-up its opposition by requesting rehearing and then filing suit,[57] despite the fact that

[52] Ex. DNREC-1, Direct Testimony of Tom Noyes, DNREC, 8:14-17
[53] Id. at 6:5-8.
[54] Id. at 8:17-18.
[55] Ex. JF-15, Firestone, Supplemental Testimony at 14:5-8.
[56] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 21:22 – 22:1 (noting that it is "possible" that REC prices would be higher if the Rock Island line is not built); Id, 14:2-14 insufficient wind power in PJM would result in REC supply "not be[ing] sufficient to meet the overall demand," resulting in a "seller's market" such that "prices could go higher."
[57] Id. at 16:7-14.

DNREC "would like to see" that transmission project as it "would be beneficial … in that it would deliver a large capacity of wind power into PJM."[58] Exelon's unyielding opposition regarding the Rock Island Clean Energy Line brings to mind a concern Mr. Noyes expressed earlier:

> If Exelon uses its market power to limit the supply of inexpensive wind power, it would make to make it more difficult to establish and develop this market and lower the cost of renewable energy. To the extent that Exelon is protecting its own commercial interests by limiting the development of renewable energy, it would in effect be thwarting Delaware's express interest in promoting cost-effective renewable energy.[59]

In addition, Mr. Noyes was unable to confirm that the proposed settlement would restrict Exelon's opposition to transmission projects like the Clean Energy Line that aim to bring wind power and RECs to Delawareans.[60]

42. Exelon vehemently opposes the wind **production tax credit** (PTC) because of its economic effect on its generation assets, a position that is diametrically at odds with state policy.[61]

a. Most troubling, Mr. Noyes acknowledged that there is nothing in the proposed settlement to prevent Exelon from continuing this and similar advocacy that runs counter to state policy and to the best interests of the ratepayers.[62] In a similar vein, Mr. Noyes was unable to confirm or deny whether the concerns of the Independent Market Monitor had been satisfied by the proposed settlement.[63] In other words, the proposed settlement

[58] Id. at 17:24 – 18:4.
[59] Ex. DNREC-1, Noyes Direct Testimony at 9:14-21.
[60] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 22:6-10.
[61] Id. at 9:2-3. "DNREC would not agree with Exelon's position on the Production Tax Credit."
[62] Id. at 9:2-5 and 22:2-5.
[63] Id. at 8:17-22.

provides little comfort that market power and economic incentive incompatibility concerns have been adequately addressed.

b. Indeed, so concerned is Exelon with its nuclear generation profits that it finds common cause with large owners of coal generation assets, with CEO Christopher Crane complaining that the wind PTC is impairing coal plants he considers to be "critical." Mr. Crane blames the "artificial" price suppression effects of the PTC on coal's demise, yet he conveniently neglects to account for the artificial price suppression effects of the numerous subsidies to the coal industry not to mention coal's severe environmental, health and climate externalities.[64] If the PTC does not exist, the 2.3 cents/kWh will have to come from somewhere. While developers may have smaller profits, it would be folly to expect that REC prices will not increase.[65]

43. Exelon's hostility to wind power is perhaps most evident in the clear and unequivocal characterizations made by its CEO Christopher Crane. Mr. Crane unapologetically states that there is an "overbuild," an "oversupply" and indeed, "excess" wind power.[66] Really? Here in Delaware we have all of 2 MW.

44. These factors led DNREC's Tom Noyes to conclude that "the merger poses serious questions of divergent interests when it comes to Exelon's generation assets and Delaware's

[64] Id. at 13:4-20.
[65] Ex. JF-15, Firestone Supplemental Testimony, 14:9-12.
[66] Ex. JF-11, Christopher Crane Response to Requests for Admissions and Interrogatories in lieu of deposition, Response to Request for Admission 1.

interests in promoting renewable energy and energy efficiency, and in maintaining transparent, competitive energy markets in PJM."[67]

45. The General Assembly has declared**,** 26 Del. C. § 351(b) that the benefits of renewable energy include "improved regional and local air quality" and "improved public health." This occurs because renewable energy in PJM displaces primarily coal and natural gas.[68] It is reasonable to assume, and the General Assembly has effectively determined, that if additional renewable generation capacity is built, some of the displaced fossil fuel generation will be upwind from Delaware. Delaware citizens incur health costs due to air pollution and citizens and businesses incur costs to comply with clean air standards as a result of emissions from existing upwind fossil fuel generation. Exelon's policies, practices and advocacy however work at cross-purposes of the General Assembly and will have negative health consequences for Delawareans.

46. In addition, Delaware is among the states most susceptible to **sea level rise**, with potentially large economic, social, environmental and cultural costs. Each of these is a real cost.

47. "It is important to recognize that the above actions do not make Exelon evil or suggest ill intent; rather they merely reflect the fact that Exelon is a rational, profitmaking capitalist. It has obligations to its shareholders and, as between the regulated profits it garners from its utility businesses and the unregulated profits and losses is faces in its generation business, its fiduciary duty to its shareholders requires that it act in a manner that is in its shareholders' best interests

[67] Ex. DNREC-1, Noyes Direct at 3:8-11.
[68] Ex. JF-15, Firestone Supplemental Testimony, 14: 18 – 15:3. See also GE Energy Consulting for PJM in 2014, Executive Summary, PJM Renewable Integration Study.

irrespective of any negative consequences to DPL's ratepayers and Delaware citizens. This is in contrast to PHI, which shed its generation business and focuses on being the best supplier it can be, and where the incentives between shareholders and customers are in reasonable alignment."[69]

48. The proposed settlement includes ring fencing to lower the risk to ratepayers from nuclear decommissioning or accident, but contains no "ring fence" to protect ratepayers from Exelon's rational, profit maximizing behavior. The proposed settlement that is before the Commission is thus patently deficient under a proper understanding of the breadth of the term "public interest" as developed above.[70]

49. Any entity that would seek to merge with PHI and re-integrate its distribution customers with generation would have a difficult case to make; given Exelon's actions regarding the Rock Island Clean Energy transmission line, RPS laws, the PTC and the like and the strong economic, political and policy driver its nuclear assets embody, Exelon simply cannot meet its burden that the change in control is consistent with the public interest absent either restructuring (divesting of its generation assets, and it nuclear assets in particular, by a date certain) or agreeing to substantial commitments of renewables above and beyond the "minimum" standards established by the General Assembly in the RPS law.[71]

[69] Ex. JF-15, Firestone Supplemental Testimony at 18:8-16.
[70] Id. at 18:17 – 20:1. See *infra*, ¶¶ 8-13.
[71] Id. at 19:2-22. See id for a full list of conditions.

B.4. The Proposed Settlement Falls Far Short of the PSC Staff's Interpretation of what is Required in the Public Interest and is Inconsistent with the Testimony of DNREC's and MAREC's lead witnesses, Tom Noyes and Peter Bradford, respectfully.

50. On January 5, 2015, after the close of discovery, Connie S. McDowell, on behalf of staff submitted supplemental testimony, attaching Exhibit CSM-1, Staff Merger Requirements. Ms. McDowell described the "requirements" as "essential to ensure the Joint Applicants merger request is in the public interest"[72] and the elements contained within the exhibit "as the appropriate consideration that would be consistent with the public interest in this merger application."[73] Ms. McDowell described the requirements as "balanced" as well as "fair and equitable to the Joint Applicants and Delmarva Power ratepayer interests.[74] The Staff valued the proposed "requirements" at just $95 million, which it noted was "less than 6% of Exelon's purchase premium and reasonably in range of Delaware's 10 year synergy benefit of $83 million."[75]

51. The PSC Staff-identified public interest requirements that are essential to find the change in control to be consistent with the public interest, include in pertinent part:

a. **Specified Residential Customer Funds** of $50 per residential customer (per the application is valued at $17 million)

b. **Specified Renewable/Energy Efficiency Funds**

   i. $4 million for energy efficiency measures

   ii. $1 million for study and recommendations related to offshore wind

[72] Ex. S-2, McDowell Supplemental Testimony, 1:27-28.
[73] Id. at 2: 10-12 (emphasis added).
[74] Id. at 3: 7-8.
[75] Id. at 2: 17-18.

iii. $500,000 to support renewable energy and energy efficiency education

c. **150 to 200 MW of renewable energy capacity** to be incorporated into SOS

d. **Study of additional generation in southern Delaware** and natural gas transmission in southern Delaware

e. **Risk protection and assurances**

i. Ring Fencing

ii. Commitment not to leave PJM

iii. Job guarantees

iv. Local presence

v. Demand response

vi. SEU coordination

f. Other

i. Amortized Funds (Unspecified): $40 million, amortized over 10 years (including for energy efficiency) (discussed above)

ii. Account delinquency protection

iii. System reliability

52. The proposed settlement provides the following, which to even the untrained eye, fall far short of those requirements the PSC Staff identified as essential to ensure the merger is both in and consistent with the public interest. These are summarized below and then items a-e are discussed in turn[76].

a. **Specified Consumer Protection and Job Training Funds**

i. $2.0 million for Job Training (¶ 8)

[76] Ex. JA-47.

ii. $350,000 to Consumer Advocates of PJM States (¶ 95c)

b. **Specified Renewable/Energy Efficiency Funds**

i. Up to $2.0 million for energy efficiency (low income) (¶17)

c. **Up to 120 MW** of **RECs (no energy or capacity)** from wind power (¶84)

d. **New natural gas generation study and** natural has pipeline extension study (¶ 9**)**

e. **Risk protection and assurances:**

i. Corporate governance, **ring fencing**, affiliate transactions, pushdown accounting and supplier diversity (¶¶ 10-16, 18-73, 75);

ii. Committing not to leave PJM for ten years (¶(¶ 94-95)

iii. Near-term employment protections (¶¶ 3-7)

iv. Local presence assurances (¶¶10-16)

v. Demand response assurances (¶17)

vi. SEU coordination, including behind the meter interconnection for distributed generation (¶¶ 97-101)

f. Other

i. Amortized Funds, Specified For Residential Customers

1. $40 million (monthly payments over 10 years at 4.5% equals $49.17 million) (¶85); accounting for merger related costs and savings (¶¶ 86-93) (addressed above)

ii. Accounts receivable forgiveness (¶ 77)

iii. System reliability (¶¶ 79-83)

iv. Vehicle Emission Control, (¶ 102)

53. **a. The Settling Parties Shrink $17 Million in Required Unspecified Funds by 86 Percent and Designate them to Specific Uses.** From the public interest "requirements" to the proposed settlement, $17 million in unspecified customer funds shrank and morphed into $2 million in job training and $350,000 in PJM advocacy.[77] While the Commission may well find that these are worthy areas of funding given the economic dislocation of the merger and the generation-centric incentives of Exelon in PJM, the proposed settlement funding represents a steep 86% decrease compared to what was "required in the public interest" according to Staff.

54. **b-c. The Settling Parties Marginalize Renewable Energy and Energy Efficiency Funding and Development.** In the requirements document, Staff declared that $5.5 million was required in the public interest, yet the settling parties included only "up to" $2 million in the proposed settlement. Energy efficiency funding fell by, in the best case, from $4 million to $2 million—the curious use of the qualifier "up to" connotes that $2 million is a ceiling, with the floor being $0[78]—and, funding for renewable energy/energy efficiency education and offshore wind power research simply disappeared. When Mr. Noyes was asked what minimum amount could Exelon spend on energy efficiency and be compliant with the proposed settlement, his reply was not reassuring: "Well, I confess, I don't know."[79] DNREC was unable to secure even the $4 million that Staff testified was required, and then unsuccessfully opposed DPA's further reduction of energy efficiency commitments to a cap of $2 million.[80] Given Exelon's aversion to anything that affects generation revenues, even the Staff's minimum requirements were plainly

[77] Both the "requirements" and the proposed settlement included $40 million to be amortized over ten years, so can be disregarded for the purposes of this comparison.
[78] Ex. JA-47, Proposed Settlement, ¶17.
[79] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 39:6-11.
[80] Id. at 58:16-19.

inadequate; the proposed settlement only more so. Despite the much greater societal (public) benefits from energy efficiency as detailed above, the proposed settlement allocates at most a slim nickel to energy efficiency for every dollar it allocates to customer rebates.

55. Energy Capacity and RECs to just RECs and a Decrease in Quantity. As noted above (paragraphs 36-49, which are incorporated into this paragraph by reference), the settling parties seek to have this Commission bless a repackaging of how Delmarva Power is to comply with an existing Delaware law that already requires it to obtain the RECs in question as a major step forward, when as noted above it is a step backward. As well, the quantity of certificates, which is capped at 120 MW, also falls of the 150-200 MW identified by Staff as required in the public interest—a requirement that included that generation in addition to RECs, and that Mr. Noyes described as a "useful provision."[81] Likewise, it falls short of the 175 MW of "wind energy or other renewable energy resource" estimated by DNREC's Tom Noyes that will be required to meet Delmarva Power's 2024-2025 REC requirement.[82]

56. In addition, when Mr. Noyes was asked during his direct testimony about other prudent commitments Exelon could make, he responded that Exelon undertake market power mitigation along the lines of what it did to gain approval of the Exelon/Constellation merger—125 MW of Tier 1 renewables (essentially wind power) and 30 MW of solar,[83] yet, as noted, no such market power mitigation is included in the proposed settlement. On cross-examination, when asked

[81] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 47:8-11.
[82] Ex. DNREC-1, Noyes Direct, 6:10-11.
[83] Id. at 22:13-17.

about this area of inquiry—that is, whether the Exelon/Constellation settlement required energy as well as RECs, Mr. Noyes was only able to respond: "If you say so."[84]

57. Moreover**,** at his deposition in lieu of live testimony, Mr. Noyes was asked by DPA whether he agreed with Dr. Firestone's assessment that the renewable energy and energy efficiency requirements in the proposed settlement were "meager at best, harmful at worst."[85] The only reasons Mr. Noyes stated for disagreeing with Dr. Firestone's sentiment was that the proposed settlement provided for long-term procurement of RECs and that he was hopeful that Exelon would voluntarily seek bids for energy in addition to RECs.[86] Such hope, particularly in light of Exelon's track record and statements, however, does not rise to the level of consistency with the public interest.

58. Peter Bradford, former Chair of New York PSC and the Maine PUC, and a former Commissioner of the Nuclear Regulatory Commission testified that the "merger is highly likely to undermine Delaware law and policy in the form of the state's renewable portfolio standard" and noted that Exelon had failed to expressly commit to comply with Delaware's RPS, an omission that "cannot be accidental."[87] Nor can it be accidental given all of the other promises to comply with Delaware law that Exelon has continued to avoid making that commitment throughout this docket, including in the proposed settlement.[88] As Tom Noyes acknowledged,

[84] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 34:16.
[85] Ex. JF-15, Firestone, Supplemental Testimony at 20:3-5
[86] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 51:15-– 53:1.
[87] Ex. MAREC-1, Direct testimony of Peter Bradford, 10:3-5 and 10:9-13.
[88] Ex. JF-14, Cross-examination Deposition Transcript of Thomas Noyes, 25:11-13

the requirement that Exelon seek out up to 120MW of RECs falls 55MW short of what is required to comply with Delaware's RPS law.[89]

59. After reviewing the totality of Exelon's behavior, Mr. Bradford was left with the inescapable conclusion that "Exelon is plainly seeking to stifle renewables as a future competitor to its operating reactors."[90] Despite Mr. Bradford's concerns, the proposed settlement does nothing to limit Exelon's ability to stifle renewables such as gain a commitment from Exelon to exceed the minimum RPS requirements established in Delaware law; build or contract for wind power capacity as it did in the Constellation settlement in Maryland; withdraw its objections to the Rock Island Clean Energy line; and agree not to seek support from Delmarva Power ratepayers for any of its nuclear power plants, including through the adoption of a Clean Energy Standard in Delaware that would encompass nuclear generation.

60. In discussing how to address Exelon's hostility to renewables and the economic incentives Exelon has that underpin its hostility, former Chair/Commissioner Bradford stated that it was important for the Commission to include in any approval of the change in control protections that are "structural in nature."[91] Included among those structural requirements is establishment of "conditions by which Exelon will not take actions at the state and federal levels that would be inconsistent with the sound public policy of the State of Delaware."[92] The proposed settlement unfortunately contains no such structural protections and thus leaves Delmarva ratepayers bare.

[89] Id. at 23:10-21.
[90] Ex. MAREC-1, Direct testimony of Peter Bradford, 20:15-16.
[91] Id. at 34:17-18 (emphasis added).
[92] Id. at 34:12-14.

61. Like Dr. Firestone and Mr. Noyes, former Chair/Commissioner Bradford also saw the importance of Exelon moving beyond mere paper commitments, declaring that the "Commission should order Delmarva to conduct a new request for proposals (RFP) … for long-term contracts for RECs and renewable energy…."[93] He rightly noted that such contracts "will provide Delmarva ratepayers the assurance that they will receive a competitively procured fixed price product that will provide them a cost-effective, long-term hedge against the price volatility."[94] As noted, contrary to the testimony of Firestone, Noyes, Bradford and McDowell, no such long-term fixed price renewable energy contracts are included in the proposed settlement.

62. In sum, the proposed settlement employs a second- or third-best measure related to renewables, which by definition falls short of the standard under which Delmarva Power has operated and it fails to garner an Exelon commitment to meet the REC shortfall. This dual shortcoming is by definition not consistent with the public interest, as the Staff earlier acknowledged, when it "required" not only RECs, but the development of renewable energy and capacity resources.

63. **d. The Settling Parties Advocate for New Natural Gas Generation in Delaware rather than Land-based or Offshore Wind Power.** Although this provision survived the requirements document and finds itself in the proposed settlement, it is likewise not consistent with the public interest. The Settling Parties attempt to further their objectives for downstate natural gas generation by bootstrapping a General Assembly desire to study the possible

[93] Id. at 35:11-13 (emphasis added).
[94] Id. at 35:13-16.

extension of downstate natural gas pipeline capacity. "This slight of hand is not consistent with the public interest because (a) it is not consistent with the need for, and policy favoring, fuel diversity[95] within the State of Delaware given the state's exceedingly natural gas-centric generation; (b) it is not consistent with the need for and policy favoring price stability[96]; (c) new natural gas generation would result in climate and human health impacts; and (d) to the extent new generation is considered in the southern part of the state, the generation should be land-based wind power."[97] This bootstrapping even confused DNREC's Tom Noyes.[98]

64. As Dr. Firestone stated, wind power technology breakthroughs over the past several years present new opportunities in southern Delaware. Unlike additional in-state natural gas generation, such wind power generation would be "diverse fueled, price stable, and emissions-free," would have the "effect of suppressing prices more generally"[99] and could provide income to Delaware's farmers. At his deposition in lieu of testifying on cross-examination at the hearing, DNREC's Thomas Noyes concurred in the assessment that new natural gas generation would not be diverse-fueled,[100] was unable to say whether it would be price stable,[101] acknowledged that in contrast, a long-term contract for wind energy would be a "long-term

[95] Title 26 Del. Code §1007(c)(1)b.5.
[96] Title 26 Del. Code §1007(c)(1)b.7. See also, Andrea Crane, DPA, "I think rate certainty is a benefit regardless of the rate level**."** quoted and relied upon by, Constellation V. Public Service Commission, 825 A. 2d 872 (Del: Superior Court 2003).
[97] Ex. JF-15, Firestone, Supplemental Testimony at 21:5-11.
[98] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 43:19 – 44:15 (Mr. Noyes did not know whether SJR covered natural gas generation or not).
[99] Ex. JF-15, Firestone, Supplemental Testimony. at 21:18-19.
[100] Ex. JF-14, Cross-examination Deposition Transcript of Tom Noyes, 41:3-9.
[101] Id. at 41:11-13. Mr. Noyes was aware of the downward trend over the past five years, but could not recall prior upward movement, which in part led to HB6. Id. at 41:17 – 42:2.

hedge against price volatility,"[102] and did not "know the answer" to the question of whether "additional fossil fuel generation in the State of Delaware [would] be consistent with Delaware's climate policy goals."[103] In sum, having Exelon study new natural gas generation is not consistent with the public interest; failing to have Exelon study land-based wind power is likewise not consistent with the public interest.

65. Mr. Noyes raised five areas of concern: "(1) the need for a robust market for renewable energy, (2) keeping Exelon and Delmarva Power in PJM, (3) mitigating Exelon's market power within PJM, (4) ensuring that demand response and energy efficiency can be sold into PJM markets, and (5) using a portion of any Customer Investment Fund ("CIF") funding that might come to Delaware to promote energy efficiency."[104] As developed above, the proposed settlement fails in part or in whole on items (1), (3) and (5). The proposed settlement (1) prioritizes new natural gas generation over land-based wind power, provides for certificates rather than "renewable energy" and does not commit Exelon to agree to meet the existing RPS; (3) may or may not according to Mr. Noyes satisfy the IMM on the issue of market power mitigation, does not constrain the extent or duration of Exelon's opposition to the Rock Island Clean Energy Line, (which DNREC was unaware of), and does nothing to constrain Exelon from opposing policies of the State of Delaware, such as State's support for the PTC; and (5) at most includes a trifle for energy efficiency, although it guarantees not a single dollar.

[102] Id. at 35:17-21.
[103] Id. at 43:7-14.
[104] Ex. DNREC-4, Supplemental Testimony of Thomas Noyes, 2:18 – 3:2.

66. **e. The Proposed Settlement Transfers Risk to the Ratepayers.** Ring-fencing provisions while welcome are not a guarantee, and as such they transfer risk to the ratepayers. The failure of the ring-fencing provisions to fully protect Delmarva ratepayers was acknowledged by no less than PHI's CEO, who testified, "that it [ring-fencing] is not a one hundred percent guarantee."[105] Likewise, Exelon's ring-fencing witness described the ring-fencing measures as according only a "significant degree of confidence" as to their effectiveness.[106] While the Exelon makes much of a letter it will procure in the future about the effectiveness of the measures it did commit to, that letter will not (and indeed cannot) state that there is no possibility whatsoever of any financial exposure to Delmarva Power from a claim. Nor will that letter state that there is no possibility that Delmarva Power will have to expend funds to defend against an attempt to breach the ring fence. These possibilities call for Exelon to insure against such risks, which the proposed settlement neglects to require of Exelon. Because under the proposed settlement costs associated with the residual risks that remain are transferred to the ratepayers, the proposed settlement is not consistent with the public interest.

67. The proposed settlement also compares dis-favorably to the $1.6 billion in premiums that Exelon will pay PHI's stockholders should the merger be consummated, and to the recent merger between Exelon and Constellation Energy. In that merger not only did Exelon pass on significantly more funds to ratepayers—a $113 million in customer bill credits—it directed an

[105] Ex. JF-1, Deposition Testimony of Joseph M. Rigby, 82:21-22.
[106] Ex. JA-19, Rebuttal Testimony of Ellen Lapson, 32:2-3. Also see other less than unequivocal statements by Ms. Lapson: corporate separateness measures "reduce or eliminate" possibility of consolidation (26:19-22); measures "eliminate or greatly reduce" possibility of voluntary bankruptcy (28:1-3); other measures "materially reduce" or "help refute" the possibility of consolidation or "aim to protect" the stand-alone finances of Delmarva Power (29:7-8; 30:11-15);

additional $113.5 million for support for items such as energy efficiency and low-income energy assistance as well as $30 million towards offshore wind power research, an investment of approximately $680 million to fund 155MW of renewable generation (as compared to paper RECs) of which 30 MW would be solar generation and at least 62.5MW will be wind power generation as well as many other investments totaling in the multi $100 million dollars.[107]

C. Exelon Cannot Meet its Burden of Demonstrating that a Change in Control is in the Public Interest Given Its Actions is this Docket.

68. Exelon's actions in this docket also raise substantial concerns about whether it should be entrusted with the public good.[108] In particular, in this docket:

- Exelon entered into a discovery agreement, turned around and breached that agreement, and then supported this Commission upholding the Hearing Examiner's unprecedented imposition of discovery sanctions in response to an attempt to in part seek enforcement of that discovery agreement.[109]
- Exelon disingenuously argued that a Motion for Reconsideration should be denied because it was untimely when it, like the proponent of the Motion, had no actual notice of

[107] In the Matter of the Merger Exelon Corporation and Constellation Energy Group, Before the Public Service Commission of Maryland, Case No. 9271, Order No. 84698 (February 17, 2012), Conditions of Approval, pp. 102-115 available at http://webapp.psc.state.md.us/Intranet/casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\Casenum\9200-9299\9271\\278.pdf.

[108] For further elaboration on these actions see Argument C, Paragraphs 51-63, which are incorporated into this argument by reference.

[109] See Order 8637 (September 17, 2014) and Joint Applicant's Answer to Intervenor Jeremy Firestone's Interlocutory Appeal, September 24, 2014, which is incorporated herein by reference. See also Jeremy Firestone's Petition for Interlocutory Review of September 22, 2014 filed in this docket. The September 22, 2014 Petition, including all seventeen attachments attached thereto is incorporated by reference.

the Order that the Motion was addressed to.[110]

- Exelon has continually argued that parties' intervention should be limited to a few narrow issues in an attempt to prevent intervener inquiry into whether the merger is for a proper purpose and consistent with the public good.[111]
- Exelon supported before this Commission a patently unlawful order issued by the Hearing Examiner that purported to be an "agreed" deposition order, when it knew there was no such agreement, and that violated basic principles of fairness and parties' due process rights by baring both *Pro Se* parties and those represented by lawyers admitted *Pro Hac Vice* from questioning Exelon and PHI witnesses during depositions. Despite Exelon's desire that I, along with others, be barred from asking its witnesses any questions at depositions, this Commission wisely granted an Interlocutory Petition and overturned the Hearing Examiner's order.[112]
- Exelon argued, in the context of its Motion to Amend the Schedule, that the one person opposing the Settlement (me) did not need to be afforded an opportunity to present live testimony or to cross-exam witnesses, but instead, could be relegated to making written filings.[113] Exelon went so far to argue that any prejudice suffered would have to be

[110] See references at footnote immediately proceeding, including attachment 12, to the Interlocutory Petition, the Joint Applicant's Opposition to Motion for Reconsideration and attachment 13, the email from Todd Goodman expressing that the Joint Applicants were unaware of the Order.
[111] See e.g., Joint Applicants' Response to Firestone 1st Discovery Request (Ex. 6, Response to Interrogatory 14) to Interlocutory Petition of September 22, 2014.
[112] Joint Applicants' Answer to Intervenor Jeremy Firestone's Second Interlocutory Appeal, October 8, 2014 and Commission Order 8665 (November 13, 2014).
[113] Joint Applicants' Reply in Support of Motion to Amend the Scheduling Order, ¶7. Such Reply is incorporated herein by reference.

weighed against the fact that Delaware law favors settlements, suggesting that citizen rights can be easily marginalized[114]

In sum, Exelon's actions suggest a disdain for an open, democratic process with an involved citizenry, which runs counter to the very notion of a Commission that **serves** the public. On that ground alone, there is more than sufficient evidence to support a finding that Exelon has failed to establish that the merger is consistent with the public interest.

D. Exelon Cannot Meet its Burden of Establishing that the Change in Control is for a Proper Purpose.

69. The Joint Applicants refused to produce any private documents such as email that could shed light on a purpose other than those articulated in the Joint Application.[115] Purposes other than those disclosed in their application might include, for example, the ability to satisfy stockholder calls for dividends[116] or that it would assist Exelon in its ability to constrain future renewable energy mandates in the PHI jurisdictions. We do know from testimony by Exelon's CEO that the former is a strong advantage for Exelon if the merger goes through if not a purpose. Because Exelon refused to answer interrogatories and produce documents related to those private purposes, and no inquiry could as a result, nor has it been had into the same, Exelon cannot as a matter of law, establish that the merger is for proper purposes. As a consequence, this Commission has no choice but to deny the Joint Application.

[114] Id. at ¶ 9.
[115] Response to First Set of Data Requests, No. 14.
[116] Ex. JF-13, Deposition of Christopher Crane, 44:21-45:2.

E. The Evidentiary Record is Incomplete and Inadequate as a Result of Improper Discovery Rulings that Denied Due Process and that are Fundamentally Unfair.

70. Assuming for the sake of argument that on the record presented that the evidence before the Commission was sufficient for the Commission to find that the merger was undertaken for a proper purpose and is consistent with public interest and the settlement is in the public interest, the Commission still could not approve the change in control because the evidentiary record before it is incomplete and biased toward Exelon given (a) Exelon's discovery agreement breach; (b) improper discovery phase rulings by the Hearing Examiner resulting in a denial of due process and an unfair process; and (c) evidence of bias by the Hearing Examiner.

71. First, in response to my first Motion to Compel, the Hearing Examiner (a) did not give effect to a discovery agreement entered into between Exelon and me. As noted in my Interlocutory Petition of September 22, 2014, pursuant to the agreement, I agreed to withdraw some discovery requests, modify others and the Joint Applicants agreed to not to file a single blanket objection to the remaining or modified requests, including all of the subparts, but when they filed their discovery responses they engaged in numerous breaches, including refusing to answer the discovery requests that were modified to meet their concerns. See id at ¶¶ 6-8. The Hearing Examiner than endorsed those breaches, ignored his own scheduling order, which had established a deadline for blanket objections that the Joint Applicant's missed, and then compounded his error by applying a specific objection to a single discovery request to the entire request. Id. at ¶ 9.

72. When I learned of there errors, I immediately filed a Motion to Reconsider. The Hearing Examiner's immediate response was to publicly lash out a PSC staffer and at me. Id. at ¶ 11.

73. While this was ongoing, I filed a second discovery request. This time the Joint Applicants filed timely objections and I then filed a second Motion to Compel because the Joint Applicants cherry-picked when and how to respond, completely failed to provide some discovery responses and failed to provide privilege logs. Id. at ¶¶ 16-18.

74. Rather than fix the clear errors he made in his first order on the Motion for Reconsideration, the Hearing Examiner endorsed his clear errors. As a result, the Joint Applicants were not required to produce any private documents or communications regarding the purposes for the merger nor were they required to do so for many renewable energy topics such as positions related to wind power (this despite the fact that there are designated federal wind energy area offs of Maryland and Delaware). As a further result, the record is by definition incomplete and requires supplementation.

75. The Hearing Examiner compounded his prejudicial ruling on the first motion, by denying the second motion to compel as well, and then even more so by limiting my ability to undertake discovery in the future—barring me from asking any further interrogatories[117] or making further requests to produce documents. As well, in an attempt to intimidate, he threatened me with expulsion from the docket should Exelon in the future find my actions troubling to it.[118]

[117] Order 8637, ¶ 11. I was permitted to continue to file requests for admission and I did file a few interrogatories per an agreement with the Joint Applicants to do so in lieu of exercising my right to ask fifteen minutes of questions to Exelon CEO Chris Crane.
[118] Order 8637, ¶ 11g).

76. The Hearing Examiner's action became even more prejudicial when the Joint Applicants filed substantial rebuttal testimony, including testimony from several new witnesses, and I was as a result unable to tender interrogatories or request for documents regarding the same.

77. The Hearing Examiner's initial response to my Motion for Reconsideration of his order, his total failure to endorse a discovery agreement, his conscious decision to ignore the deadlines established in his earlier order and to correct the clear errors he had made, his action to limit my discovery rights and his threat of expulsion are not only prejudicial, they are evidence of bias.

78. Recognizing the harm to the docket and to the Commission, I sought to have the Hearing Examiner removed, but this Commission declined to grant my Interlocutory Petition and thus never ruled on the Petition's merits.

79. The Hearing Examiner then issued his unlawful "agreed order" on depositions. Not only was the order inaccurately titled—while there may have been agreement between Exelon and the Hearing Examiner—I was not consulted regarding the same, let alone did I agree to it. The Hearing Examiner sought to protect Exelon and silence me by barring me from asking any questions of Exelon's witnesses in their depositions. In response to my Interlocutory Petition, this Commission rightly granted that Petition and ordered that I be given an opportunity to ask questions.

80. While preparing for the February evidentiary hearings, I filed a Motion in Limine to limit (but not prevent) the testimony of two witnesses in very particular ways. For example, rather

than addressing the (fatal) methodological deficiencies of testimony of their expert witness and related unreliable synergy analysis that the Joint Applicants had relied on during direct, they sought a "do over," replacing the analysis with Mr. Khouzami's testimony on rebuttal, in which he advanced a new theory and methodology.

81. The Hearing Examiner denied my Motion in Limine on grounds that included that it was untimely. He did so even though I went out of my way to file it one day and four hours prior to the deadline that he had earlier established in his Scheduling Order. I filed early to accommodate both the Joint Applicants and the Hearing Examiner given tight time deadlines in advance of the scheduled February 18-20 hearings, yet the Hearing Examiner concluded I was equitably barred because, according to him, I should have filed the Motion even earlier than I did. Order 8707, paragraph 15 (February 2, 2015). It is as if the Hearing Examiner applied the equitable doctrine of laches to negate a statutory regime that is governed by a statute of limitations; only it is worse, in that he applied an equitable bar to negate a deadline he himself had previously established in his own Order. This is further evidence of bias.[119]

82. In Vincent v. Eastern Shore Markets, 970 A.2d 160, (Del. 2009), the Delaware Supreme

[119] It is true that the Hearing Examiner informally sided against DNREC in a dispute with me over the cross-examination deposition of Thomas Noyes, in which DNREC sought to have me pay for the court examiner (as well as limit the time and scope of the examination). However, he did so only in the context of a dispute between two environmental intervenors and where at the time, unlike previously, one of the intervenors (me) was now the only active opponent to the merger—that is, I was not joined in opposition by the PSC staff or the DPA. Moreover, despite the fact that the Commission ruled in Order 8718, ¶10, that the all of the "parties and the Commission" might have to make accommodations given DNREC's counsel's vacation schedule as it related to the compromised evidentiary hearing date (I had proposed three alternative dates, but agreed to the April 7 date), the Hearing Examiner stated that if I wanted a copy of the transcript, which is the only way I could use the cross-examination at the hearing, that I, a *pro se* party, would have to pay for the transcript, which I did out of my own bank account.

Court set forth the due process requirements for administrative proceedings:

> In the exercise of quasi-judicial or adjudicatory administrative power, administrative hearings, like judicial proceedings, are governed by fundamental requirements of fairness which are the essence of due process, including fair notice of the scope of the proceedings and adherence of the agency to the stated scope of the proceedings. Due process, unlike some legal rules, is not a technical notion with a fixed content unrelated to time, place, and circumstances; rather it is a flexible concept which calls for such procedural protections as the situation demands. As it relates to the requisite characteristics of the proceeding, due process entails providing the parties with the opportunity to be heard, by presenting testimony or otherwise, and the right of controverting, by proof, every material fact which bears on the question of right in the matter involved in an orderly proceeding appropriate to the nature of the hearing and adapted to meet its ends.

Id. at 163-64 (citations omitted) (emphasis added). Under Vincent, this docket, like a proceeding in Superior Court, is governed by due process, including fairness. Thus, for example the General Assembly explicitly commanded that depositions in Commission proceedings be "taken in the same manner as prescribed in law or by the rules of the Superior Court…" 26 Del. C. § 508.

83. As documented above, the Hearing Examiner's rulings created anything but an "orderly proceeding" appropriate to the gravity of the issues being considered in the docket. As well, such proceedings departed from the "official regularity" of proceedings before this Commission within the meaning of 26 Del. C. § 510.

84. Moreover, I was repeatedly denied the right to controvert material facts such as whether the merger was for a proper purpose, Exelon's internal positions regarding renewable energy, any and all rebuttal testimony, and the hidden nature of Exelon's synergy analysis.

85. Finally, I was denied fundamental fairness given the breach of a discovery agreement by Exelon and the bias of the Hearing Examiner.

Conclusion

86. Given the record in this docket, one is left with the inescapable conclusion that despite the non-Exelon settling parties best efforts they were unable to achieve a proposed settlement that is consistent with the public interest. They failed to address the renewable energy and energy efficiency structural issues associated with a nuclear-heavy generator gaining control of Delmarva Power; failed to gain commitments consistent with the PSC Staff's understanding of what is required in the public interest; and substituted their preferences—for example, in regard to how to use the Customer Investment Fund and to study downstate generation—for what is in the public interest. As well, Exelon has taken a citizen-unfriendly approach to this docket suggesting that it will not be as responsive as PHI and Delmarva Power have been to Delaware citizens and ratepayers, who are in fact, their customers. Finally, the proceedings suffered from procedural rulings by the Hearing Examiner to such a degree to violate fundamental notions of fairness and due process.

87. Approving the proposed settlement and approving the change in control are thus each not supported by sufficient evidence and any such approval(s) would be arbitrary and capricious and not free or error of law.

88. As former PSC Staff Director Bruce Burcat stated:

> This merger docket could likely be the most transformational case affecting the energy landscape in Delaware, since the last electric utility merger case in Delaware, when PHI merged with Conectiv in 2002. In actuality, …this merger will have a far greater consequences [sic] to the electricity market than the PHI/DP&L merger, given the breadth and size of the merger and the potential control that the surviving entity would be able to exert as a result of the transaction.[120]

I agree. Commission should likewise conclude and undertake the most searching inquiry possible of the proposed settlement and of the proposed merger consistent with that sentiment, which if it does, can lead only to the conclusion that the proposed settlement should be rejected and the proposed change of control denied.

WHEREFORE, I, JEREMY FIRESTONE, INTERVENOR, RESPECTFULLY REQUEST THAT THIS HONORABLE COMMISSION:

1. Find that the Settling Parties have not met their burden of demonstrating that the Proposed Settlement is in the public interest;
2. Find that the Joint Applicants have not met their burden of establishing that the change in control is consistent with the public interest;
3. Find that the Joint Applicants have not met their burden of establishing that the change in control is for a proper purpose;
4. Find that docket has not advanced fundamental fairness and that I have been denied due process of law; and

[120] Email of Bruce Burcat, September 18, 2014, attached as Exhibit 1 to Jeremy Firestone's Petition for Interlocutory Appeal (September 22, 2014) (emphasis added).

5. Grant such other relief as is appropriate and just.

Respectfully submitted,

Jeremy Firestone
April 1, 2015

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF DELMARVA POWER & LIGHT COMPANY, EXELON CORORPATION, PEPCO HOLDINGS INC., PURPLE ACQUISITION CORPORATION, EXELON ENERGY DELIVERY COMPANY, LLC AND SPECIAL PURPOSE ENTITY, LLC FOR APPROVALS UNDER THE PROVISIONS OF 26 *Del.* C. §§ 215 AND 1016 (FILED JUNE 18, 2014)	)	PSC DOCKET NO. 14-193

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, that on behalf of Jeremy Firestone, *Pro Se*, I filed Jeremy Firestone's Pre-Hearing Brief In Opposition To The Proposed Settlement And To The Proposed Merger with Delafile and served a copy of the same on all persons on the email service list by email attachment.

Respectfully submitted,

Jeremy Firestone
1 April 2015